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Amlink Technologies Pty Ltd and Australian Trade Commission [2005] AATA 359 – Software finally recognised as “goods”

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AMLINK TECHNOLOGIES PTY LTD AND AUSTRALIAN TRADE COMMISSION [2005] AATA 359 – SOFTWARE FINALLY RECOGNISED AS “GOODS”

Up until recently, Australian courts have avoided deciding whether software can appropriately be classed as “goods”. However, in *Amlink Technologies Pty Ltd and Australian Trade Commission* [2005] AATA 359, Senior Member McCabe held that software sold as a tangible commodity, after being copied or mass-produced, ceases to be know-how and becomes goods.

Why does it matter?

The question of whether or not software is to be classed as goods is of the greatest importance in several contexts. For example, as highlighted by Patrick Gunning, it is of relevance in the context of how the *Customs Act 1901* (Cth) regulates the export of software.¹ This note, however, examines the question of whether or not software is to be classed as goods, in the context of the *Trade Practices Act 1974* (Cth) (the Act) and the States’ Sale of Goods Acts.

The various Sale of Goods Acts enacted in the Australian States and Territories are limited to contracts “whereby the seller transfers or agrees to transfer the property in *goods*” (emphasis added). In other words, the Sale of Goods Acts are only applicable to software if software is classed as goods. Similarly, those provisions of the Act that are focused on goods (eg the implied terms outlined in ss 69-72) are only relevant in relation to software if software itself is classed as goods. At the same time, it must be noted that, to the extent that software can be classed as “services”, the effects in the context of the Act are limited, due to the fact that the Act (to a great extent) contains provisions regulating “services” in the same manner as goods (see eg s 74).

The Australian approach up until the Amlink case

In *Toby Constructions Products Pty Ltd v Computer Bar (Sales) Pty Ltd* (1983) 50 ALR 684, the Supreme Court of New South Wales had reason to consider the question of whether or not software is to be classed as goods. That case involved the sale of a package comprising three items of hardware (together valued at \$12,230) and two items of software (together valued at \$2,160). Rogers J held (at 690-691) that:

a sale of a computer system, comprising both hardware and software ... does constitute a sale of goods within the meaning of both the Commonwealth Act [ie the Act] and the State legislation [ie the Sale of Goods Acts].

However, the learned judge avoided addressing the question of whether or not software, sold separately to hardware, is to be classed as goods (at 691):

It may be a debatable question whether or not the sale of computer software by itself is sufficient to constitute a sale of goods within the meaning of the legislation [ie the TPA and the *Sale of Goods Acts*].

Rogers J also made clear (at 691) that he did not wish it to be thought that he was “of the view that software by itself may not be ‘goods’”, and concluded the issue by stating that it would be appropriate “that those who attend matters of law reform should consider whether or not legislative action is required to ensure that the matter is put beyond argument”.

Somewhat similarly, in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460, the Federal Court of Australia, while clarifying that “encoded electrical signals” do not fall within the reference to electricity for the purpose of defining what is goods under the Act, avoided the question as to whether or not software is to be classed as goods.

Approaches taken in other jurisdictions

A comparative study of how software is viewed under the law of different jurisdictions goes beyond the scope of this note. However, as Australian courts more than once have made reference to the approaches taken in the United Kingdom and in the United States, two foreign cases will be considered.

The case of *Advent Systems Ltd v Unisys Corp* 925 F 2d 670 (1991) related to the Uniform Commercial Code. There, Weis J, having drawn a rather odd distinction between “software” and “computer programs” (“Generally speaking, ‘software’ refers to the medium that stores input and

¹ Gunning P, “Distributing Encryption Software by the Internet: Loopholes in Australian Export Controls” (1998) 5(2) PLPR 42.

output data as well as computer programs. The medium includes hard disks, floppy disks, and magnetic tapes.”², noted that:

Computer programs are the product of an intellectual process, but once implanted in a medium are widely distributed to computer owners. An analogy can be drawn to a compact disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a “good”, but when transferred to a laser-readable disc becomes a readily merchantable commodity. Similarly, when a professor delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good.³

In *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481, Sir Iain Glidewell compared computer software with an instruction manual:

Suppose I buy an instruction manual on the maintenance and repair of a particular make of car. The instructions are wrong in an important respect. Anybody who follows them is likely to cause serious damage to the engine of his car. In my view the instructions are an integral part of the manual. The manual including the instructions, whether in a book or a video cassette, would in my opinion be “goods” within the meaning of the Sale of Goods Act, and the defective instructions would result in a breach of the implied terms. If this is correct, I can see no logical reason why it should not also be correct in relation to a computer disc onto which a program designed and intended to instruct or enable a computer to achieve particular functions has been encoded. If the disc is sold or hired by the computer manufacturer, but the program is defective, in my opinion there would prima facie be a breach of the terms as to quality and fitness for purpose implied by the Sale of Goods Act or the Act.⁴

However, having outlined the Sale of Goods Acts’ definition of “goods”, ie “includes all personal chattels other than things in action and money”, Sir Iain Glidewell adopted reasoning similar to that of Weis J in *Advent Systems Ltd v Unisys Corp*: “Clearly a disc is within this definition. Equally clearly, a program, of itself, is not”.⁵ In other words, in Sir Iain Glidewell’s view, just as in the view of Weis J, computer software is not sold as goods unless it is sold attached to a physical medium.

At least one commentator has predicted that the judgment in *St Albans City* is likely to be “influential when the matter comes to be decided in Australia”.⁶ Regarding growing evidence that the current trend, both in relation to software and other similar digital products such as music, is to move away from physical sales of software in favour of online distribution, this approach is highly troubling indeed. People choosing to purchase a particular song or software application online are already facing elevated risks in many ways. It certainly is hard to see why they also should lose the protection that the Act and the Sale of Goods Acts may afford to those who purchase the same song or software application from a physical store.

Amlink Technologies Pty Ltd and Australian Trade Commission

In *Amlink Technologies*, the question was whether a particular software product was to be considered as being goods for the purpose of a grant application. Having examined both domestic and foreign precedents, and making reference to *Robinson v Graves* [1935] 1 KB 579 and the Ministerial Guidelines relating to the relevant grant, Senior Member McCabe concluded (at [42]) that:

If the program had been commissioned by the purchaser and written (or even modified) to its specifications, the contract of supply is likely to be a supply of know-how or intellectual property rather than goods. The situation is different once the product is sold as a tangible commodity after being copied or mass-produced. At that point, the products cease to be know-how and become goods.

Further, in explaining his conclusion, Senior Member McCabe stated (at [43]) that:

The fact the licence agreement places restrictions on the use of the product after sale does not make it much different to music CDs and DVD movies – products that are clearly goods. The requirement for an access code is apparently an innovative attempt to combat piracy which might rob the producers of revenue. It is merely a more sophisticated protection than the regional coding system used in DVDs. That evidence does not change my conclusion. The existence of 24 hour service is also not

² *Advent Systems Ltd v Unisys Corp* 925 F 2d 670 at 10 (1991).

³ *Advent Systems Ltd v Unisys Corp* 925 F 2d 670 at 13-14 (1991).

⁴ *St Albans City and District Council v International Computers Ltd* [1997] FSR 251 at 266.

⁵ *St Albans City and District Council v International Computers Ltd* [1997] FSR 251 at 265.

⁶ Gunning, n 1.

determinative: help-desks and other forms of the round-the-clock assistance are available as part of the purchase price of many goods, such as computers and cars.

Senior Member McCabe wisely chose not to adopt the approach taken by Sir Iain Glidewell in *St Albans City*. Making reference (at [29]) to how Sir Iain Glidewell's approach "echoes the reasoning in *Lee v Griffin* (1861) B&S 272" (ie focus is placed on whether the end product is a tangible object), he noted that "Sir Iain's reasoning has the benefit of relative certainty of application, but it is not altogether satisfying". However, Senior Member McCabe stopped short of discussing whether Sir Iain Glidewell's conclusion, that software not attached to a physical medium clearly does not constitute goods, was correct or not. This is unfortunate and has the consequence that Australian law is still undetermined as to whether software, taken alone, can constitute goods.

Concluding remarks

While the decision in *Amlink Technologies* related to "the meaning of the expression *goods* at common law", there can be no doubt that it is of great importance in relation to the Act or the Sale of Goods Acts, and that the consequences of software being classed as goods are potentially huge. As long as software manufacturers and retailers were able to argue that software was neither goods nor services, the sale of software did not give rise to any implied terms under the Act or the Sale of Goods Acts. This appears unfair, and in light of Senior Member McCabe's decision in *Amlink Technologies*, it seems clear that the terms implied under the Act or the Sale of Goods Acts are applicable to software which is sold attached to some physical medium. It would be only natural if the same protection was afforded to those who chose to purchase software and other digital products online.

Summarising the developments in Australian law so far, it could be said that the first step was taken when Rogers J, in *Toby Constructions Pty Ltd v Computer Bar Sales*, recognised that software is classed as goods when sold *together with* hardware. The next step – the recognition that software sold attached to some physical medium constitutes goods – has now been taken through Senior Member McCabe's decision in *Amlink Technologies*. It is logical, reasonable and desirable that the third step, ie the recognition that software not attached to a physical medium still constitutes goods, is taken next time an Australian court has the opportunity to consider the issue of whether or not software is to be classed as goods. If such a step is taken, distinguishing between goods and services in an online context might, as this writer has been suggesting since 2001, actually be quite easy:

If a consumer enters into a contract for the provision of a digitised product and has at the time the contract is fulfilled some tangible item, the transaction is best characterised as one for the supply of goods. If, on the other hand, the consumer is left without any tangible item, the transaction is best characterised as one for supply of services. Taking an example, if a consumer buys a paper version of the Encyclopaedia Britannica in an ordinary bookstore, this is clearly a supply of goods. If the consumer orders a paper version of the encyclopaedia via the Internet, this is also clearly a supply of goods. If the consumer buys the encyclopaedia via the Internet and takes delivery of a digitised version, this is still a supply of goods. But if the consumer contracts with Britannica.com for on-line access to the latter's database, the consumer contracts for the supply of a service, since, unlike in the three first instances, the consumer is left with nothing tangible at the time the contract is fulfilled.⁷

This approach has the advantage of being technology-neutral. In other words, it affords the same protection independent of the technical medium used for delivery. Such an approach is a necessity if businesses engaged in e-commerce are ever to be allowed to compete on equal terms with "offline" businesses.

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⁷ Svantesson D and Bygrave L, "Jurisdictional Issues and Consumer Protection in Cyberspace: The View from 'Down Under'", Paper presented at the conference *Cyberspace Regulation: E-commerce and Content* (2001) Sydney, Australia.

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